IN THE COURT OF APPEALS OF IOWA

No. 3-1062 / 13-0360
Filed January 9, 2014

MARILYN J. ZISKOVSKY,
Plaintiff-Appellee,

vs.

DWANE ZISKOVSKY and
ANN ZISKOVSKY,
Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller, Judge.

Real estate installment contract purchaser appeals the district court's holding that no contract existed due to lack of mutual assent, and in the alternative, due to a lack or failure of consideration. **AFFIRMED.**

Robert O'Shea of O'Shea & O'Shea. P.C., Hiawatha, for appellants.

John W. Hayek and Laura E. Bergus of Hayek, Brown, Moreland & Smith L.L.P., Iowa City, for appellee.

Heard by Vogel, P.J., and Mullins and McDonald, JJ.

MULLINS, J.

Dwane and Ann Ziskovsky appeal the district court's finding that no contract existed for their purchase of sixty acres of land from Marilyn Ziskovsky, and quieting title in Marilyn. The court found the contract failed because there was no mutual assent, or in the alternative, for a lack or failure of consideration. The court granted Dwane and Ann easement rights and required Marilyn to repay any taxes Dwane and Ann paid on the property. We affirm the district court's conclusion, but base our reasoning on other grounds.

I. BACKGROUND FACTS AND PROCEEDINGS.

This dispute concerns the ownership of a sixty-acre tract of farmland located in Johnson County. Marilyn and her late husband Vernon began farming the sixty acres when they acquired their 272-acre farm in 1963. Vernon and Marilyn farmed the land until Vernon's death in 2006. Marilyn and her son Norman continue to farm the property.

At the time of trial, Marilyn was seventy-eight years old and lived on the family farm in rural Swisher. Marilyn has a high school education. Over her lifetime, she has worked on the farm and as a housewife and mother. She also served for a stint on an election board. Marilyn has five children. Dwane is the second oldest child.

In September 1999, Dwane and his wife Ann, acquired a six-acre tract of land adjacent to Marilyn's farm. Dwane and Ann currently live on this property. The property was zoned for agricultural use and landlocked. The couple did not have legal access to the property. The couple desired to place a manufactured

home on the property. It appears the couple was unaware, until October 1999, that Johnson County development regulations required at least forty acres of land to qualify as a "farm." A residence can be placed on a farm property without rezoning the property. It was unlikely that Dwane and Ann would succeed in rezoning the six acres to a residential classification.

Dwane and Ann testified the Johnson County zoning issues prompted them to ask Marilyn and Vernon if they would be willing to sell the sixty acres adjacent to their six-acre tract. The sale would allow Dwane and Ann to satisfy the Johnson County "farm" requirement in order to place the manufactured home on the property. Dwane stated that Vernon agreed to sell the land for $1000 per acre. Dwane and Ann went to a local attorney who gave them a real estate contract for the sale of the sixty acres. That contract forms the heart of this dispute.

On October 31, 1999, Dwane and Ann arrived at Marilyn's and Vernon's farmhouse unannounced with the proposed contract. The couple was in a hurry to have the contract signed and recorded, since the manufactured home was to be delivered the next week. Marilyn claims Dwane and Ann did not tell her what the contract was and only told her to sign the last page. She also claims she thought the contract was for an easement so Dwane and Ann could legally access their six acres. Marilyn claims the parties met for about twenty minutes; Dwane and Ann claim the meeting lasted for almost an hour. All four individuals signed the contract. Vernon also signed a "Ground Water Hazard Statement." The only witnesses to the contract were the four parties. The contract was not

notarized.[1] Marilyn did not receive a copy of the contract. The Johnson County recorder recorded the contract without the requisite notary signature.

The contract lists the purchase price as $60,000.00, payable in $500 per month payments commencing on or about November 1, 1999. The contract provides that Dwane and Ann would make a down payment of $0 on the purchase, and would take possession of the property on November 1, 1999. The contract also requires Vernon and Marilyn to pay all property taxes due September 1, 1999 and March 1, 2000, 66% of the property taxes due on September 1, 2000, and any unpaid taxes thereon payable in prior years.

Dwane claims at the time the parties signed the written contract, they made an oral agreement, which modified the written contract.[2] Dwane testified the parties made an oral agreement allowing Marilyn and Vernon to continue farming the sixty acres. In exchange for Vernon's and Marilyn's continued use of the property, Dwane and Ann would not make the $500 monthly payments. Dwane and Ann would start making payments, as required by the written contract, when Vernon and Marilyn stopped farming the land. For the next ten years, Vernon and Marilyn continued to farm the land. Dwane and Ann made no payments on the land and did not take possession of the property except for use of a portion for necessary access to the six-acre tract, but they did pay $7494 in

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[1] Handwritten under the blank notary provisions the contract contains the statement: "Realizes there is no notary wants to record anyway."

[2] At trial, none of the parties could articulate the exact terms of the purported oral agreement. Marilyn testified she thought the agreement was for an easement to Dwane's and Ann's property. She also noted that Vernon would not have wanted to split up his farmland.

property taxes over ten years.

When Vernon passed away in October 2006, the attorney handling Vernon's estate conducted a title search. He discovered the recorded real estate contract. In February 2010, Marilyn filed a petition to rescind the contract, find that no real estate contract existed, and quiet title to the real estate.[3]

In June 2012, after a bench trial, the district court entered its findings of fact, conclusions of law and judgment entry. It found that no contract existed for the sale of the sixty acres to Dwane and Ann due to a lack of mutual assent. The court granted the request to quiet title to the real estate. It concluded Dwane and Ann had no interest in that land aside from an easement across it to reach their home. Dwane and Ann have appealed.

II. STANDARD OF REVIEW.

Marilyn's claims to rescind the contract, to find that no contract existed, and to quiet title were brought in equity; therefore, our review of the district court is de novo. *Stecklein v. City of Cascade*, 693 N.W.2d 335, 336 (Iowa 2005). While we give weight to the district court's factual findings, we are not bound by them. *Schaefer v. Schaefer*, 795 N.W.2d 494, 497 (Iowa 2011). "Written instruments affecting real estate maybe set aside only upon evidence that is clear, satisfactory and convincing." Iowa R. App. P. 6.904(3)(*l*). *See Smith v. Harrison*, 325 N.W.2d 92, 93 (Iowa 1982) (dismissing petition seeking to cancel farm lease); *see also Khabbaz v. Swartz*, 319 N.W.2d 279, 282 (Iowa 1982) (affirming rescission of written offer to buy real estate).

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[3] The petition was recasted in June 2012.

III. MUTUAL ASSENT

In their appeal, Dwane and Ann argue the district court erred in finding a lack of mutual assent. They argue the signed contract provides all the evidence necessary to find mutual assent. Absent fraud or mistake, Marilyn should be bound by her signature. Marilyn counters by arguing there was not a sufficient "meeting of the minds" over the terms of the contract. She did not fully understand the terms of the contract and claims that she did not intend to enter into an agreement to sell the land. She points to the parties' lack of performance under the terms of the contract as proof the contract lacked mutual assent.

For a contract to be valid, the parties must express mutual assent to the terms of the contract. *Schaer v. Webster Cnty.*, 644 N.W.2d 327, 338 (Iowa 2002). Mutual assent is present when it is clear from the objective evidence that there has been a meeting of the minds. *Id.* To meet this standard, the contract terms must be sufficiently definite for the court to determine the duty of each party and the conditions of performance. *Seastrom v. Farm Bureau Life Ins. Co*., 601 N.W.2d 339, 346 (Iowa 1999). "[T]his assent usually is given through the offer and acceptance." *Kristerin Dev. Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986). In a contract by offer and acceptance, "the acceptance must conform strictly to the offer in all its conditions, without any deviation or condition whatever." *Shell Oil Co. v. Kelinson*, 158 N.W.2d 724, 728 (Iowa 1968). Otherwise, there is no mutual assent and therefore no contract. *Id.*

A. Written Contract.

In finding a lack of mutual assent, the district court relied on the parties'

actions following the signing of the written real estate contract. The court also considered evidence presented at trial to gain an understanding of the parties' intentions when they signed the written agreement. It concluded "that the contract relied on by Dwane and Ann as establishing their ownership of the property in dispute is invalid because the parties thereto (Vernon, Marilyn, Dwane, and Ann) did not express mutual assent to the terms of the contract."

It is well-settled contract law that if a party to a contract is able to read the contract, and is given an opportunity to do so, that party cannot later argue she did not read the contract and remove herself from the terms of the contact. *See Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 323 (Iowa 1977). "Absent fraud or mistake, ignorance of a written contract's contents will not negate its effect." *Small v. Ogden*, 147 N.W.2d 18, 22 (Iowa 1966).

The parties testified that Dwane and Ann paid an attorney to draft a contract for the sale of the sixty acres. The couple then took the contract to Vernon and Marilyn at their farmhouse. The parties sat at the kitchen table and discussed the contract. Testimony shows Vernon and Marilyn had ample time to read the four-page contract. After their discussion, the parties signed the contract. None of the parties contest the validity of the signatures on the contract. The parties do not contest the terms of the contract. The record does not show that Dwane and Ann engaged in fraud or misrepresentation of the contract. There is no evidence of duress. The record also lacks evidence that could support a finding showing the parties committed a mistake in the signing of the contract.

When a court determines if parties to a contract have expressed mutual assent to that the contract the court looks to the "objective evidence" presented. *Schaer*, 644 N.W.2d at 338. Mutual assent is not found through "the hidden intent of the parties." *Id.* In this case, the written real estate contract constitutes the "objective evidence." The contract features the signatures of all four parties. The terms of the contract are "sufficiently definite," and the parties' duties and the conditions of performance are ascertainable. *Seastrom*, 601 N.W.2d at 346.

Therefore, on our de novo review we find the objective evidence requires a finding that the parties assented to the written contract.

B. Oral Agreement.

At the time the parties signed the written contract, Dwane and Ann allege the parties also reached an oral agreement or modification that substantially changed the terms of the written agreement. Marilyn argues mutual assent to the purported oral modification was lacking because the terms of the contract were not sufficiently definite and the parties did not reach a final agreement on the terms of the oral modification.

"A written contract may be modified by a subsequent oral agreement which has the essential elements of a binding contract." *Berg v. Kucharo Const. Co.*, 21 N.W.2d 561, 567 (Iowa 1946). Consent to the modification may be either express or implied from acts and conduct. *Davenport Osteopathic Hosp. Ass'n v. Hosp. Serv., Inc.*, 154 N.W.2d 153, 157 (Iowa 1967). However, proof of a claimed oral contract must come from more than "loose and random

conversations." *Passehl v. Passehl*, 712 N.W.2d 408, 417 (Iowa 2006) (citation omitted).

Our de novo review of the record leads us to conclude that there likely was a conversation about Marilyn and Vernon continuing to use the sixty acres. However, that conversation did not constitute the "essential elements of a binding contract." The oral modification lacks "objective evidence" from which we can ascertain the definite terms of the modification. The oral agreement appears to be largely based on "loose conversations" between Vernon and Dwane. The district court correctly reasoned, "[I]t is clear that no meeting of the minds occurred on the terms and conditions of the agreement between the parties because none of the three living parties to the contract could articulate exactly what the terms agreed to by the parties were."

We therefore agree with the district court's finding that no valid oral agreement modified the existing written contract.

IV. CONSIDERATION.

Dwane and Ann next argue their written contract with Vernon and Marilyn was supported by valid consideration and did not suffer from a lack of consideration. They further assert that due to the oral agreement, there was not a failure of consideration. In support, they cite their actions of paying taxes on the property, pursuant to the written contract, and holding the $500 monthly payments in abeyance in exchange for allowing Marilyn and Vernon to continue farming the land, pursuant to the oral agreement. Marilyn responds by arguing that no contract exists, and even if it did the contract lacks consideration. Marilyn

also argues there was a failure of consideration because Dwane and Ann did not perform under the purported terms of the contract.

The separate issues of lack of consideration and failure of consideration are raised in this appeal.

> There is a difference between lack of consideration and failure of consideration. A lack of consideration means no contract is ever formed. In contrast, a failure of consideration means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been rendered. Failure of consideration covers every case where a contractual obligation is not performed irrespective of the fault of the breaching party. Thus, a failure of consideration may describe nonperformance which does not constitute a breach. A failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but is nonetheless a failure of consideration discharging the other party from his duty to perform under the contract, giving him the right to the restitution of payments already made or other benefits conferred.
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> . . . A total failure of consideration occurs when a party has failed or refused to perform a substantial part of what the party agreed to do. In these circumstances the failure or refusal to perform defeats the very purpose of the contract. *First Nat'l Bank of Belfield v. Burich*, 367 N.W.2d 148, 153. Our statute recognizes total failure of consideration as a defense. Iowa Code § 537A.3 (1983).

Johnson v. Dodgen, 451 N.W.2d 168, 172 (Iowa 1990).

Since we have upheld the validity of the written contract, we agree with Dwane and Ann that the contract did not suffer from a lack of consideration. The written contract requires the consideration of monthly payments of $500 and the payment of taxes in exchange for the ownership of the land. Additionally, because we have found that no oral modification exists, our inquiry into the failure of consideration will only focus on the written contract.

The record shows Dwane and Ann failed to make any of the $500 monthly payments, as required by the written contract. However, there is evidence Dwane and Ann paid taxes on the sixty acre property. "[A]n alleged failure of consideration must ordinarily be total in order to be a complete defense to the return performance of the other contracting party." *Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 447 N.W.2d 113, 117 (Iowa 1989). "A total failure of consideration occurs when a party has failed or refused to perform a *substantial part* of what the party agreed to do." *Johnson*, 451 N.W.2d at 172 (emphasis added). A substantial part of an agreement is defined as a "material" aspect of the agreement. Restatement (Second) of Contracts § 237 cmt. d (1981). In determining whether the failure of one party to perform under the agreement is material, amongst other considerations,[4] a court may consider "the extent to which the injured party will be deprived of the benefit which he [or she] reasonably expected." Restatement (Second) of Contracts § 241 (a) (1981).

The written contract requires Dwane and Ann to make monthly payments of $500 including 5% annual interest on the unpaid balance until the purchase

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[4] To determine the materiality of a breach, the Restatement (Second) of Contracts looks to the injured party and asks to what extent that party will be deprived of the benefit it reasonably expected, account being taken of the possibility of adequate compensation for that part. It also looks to the other party—to the possibility that it will suffer forfeiture, to the likelihood that it will cure its failure, and to the degree that its behavior comported with standards of good faith and fair dealing. Most significant is the extent to which the breach will deprive the injured party of the benefit that it justifiably expected.

Van Oort Constr. Co., Inc. v. Nuckoll's Concrete Serv., Inc., 599 N.W.2d 684, 692 (Iowa 1999) (citing Restatement (Second) of Contracts § 241 (1981)).

price of $60,000 is met.[5] The contract also requires the couple to pay certain taxes on the property. The record shows Dwane and Ann did not make any of the $500 monthly payments. They did pay $7494 in taxes on the property, as mandated in the written contract, from 2000 through 2010. Based on the written contract, Marilyn reasonably expected Dwane and Ann to make the monthly payments since those payments constituted a material part of the agreement. Dwane's and Ann's lack of monthly payments constitutes a substantial failure to perform that which the contract required of them—thus defeating the primary purpose of the contract. *See Johnson*, 451 N.W.2d at 172. We find such failure to constitute a failure of consideration by Dwane and Ann in the performance of the contract.

V. QUIET TITLE.

With respect to Marilyn's request to quiet title to the real estate, the district court held: "Dwane Ziskovsky and Ann Ziskovsky have no claim, interest, title or right in the subject property . . . save only as to easement rights to access their home located north of the subject property from the public road to the west."

Actions to quiet title are triable in equity and reviewed on appeal de novo. *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996). *See* Iowa Code § 649.6 (2009) (providing except for recovery of attorney fees, action to quiet title shall be conducted as equitable proceeding). "[A]n action to quiet title presupposes complete title in the plaintiff as against the defendant." *Cody v. Wiltse*, 106 N.W.

[5] If timely payments had been made, at $500 per month, it would have taken 167 months (13.917 years) to pay off the contract. Total interest (5% per annum): $23,351.05 (139.83 average per month). Total payments: $83,351.05.

510, 511 (Iowa 1906). The action cannot be sustained if the defendant proves some "real interest"—as distinguished from some "mere apparent or asserted right"—in the property. *Id.*

We have found that Dwane and Ann failed to perform the consideration required by the written agreement. We further found that due to a lack of mutual assent, the oral agreement does not exist. Dwane and Ann have not proven a "real interest" in the disputed sixty acres. Marilyn has met her burden of presenting clear, satisfactory, and convincing evidence to set aside the real estate contract. Iowa R. App. P. 6.904(3)(*l*). Therefore, we agree with the district court's declaration that title to the sixty acres should be quieted in Marilyn.

VI. CONCLUSION

We affirm the district court's conclusion, but not its reasoning.[6]

AFFIRMED.

[6] As neither party appealed the easement or tax reimbursement provisions ordered by the district court, we do not disturb them.